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No. 598

NOV 18 1918

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

BUTTE & SUPERIOR COPPER COMPANY, LIMITED, A CORPORATION,

(Defendant) Appellant,

against

CLARK-MONTANA REALTY COMPANY, A CORPORATION, AND ELM ORLU MINING COMPANY, A CORPORATION,

(Plaintiffs) Appellees.

MOTION TO ADVANCE THE CAUSE UNDER RULE 28 AND NOTICE OF MOTION.

T. L. CHADBOURNE,
A. S. BABBITT,
WM. WALLACE, JR.,
Counsel for Appellant.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

BUTTE & SUPERIOR COPPER COMPANY, Limited, a Corporation,
(Defendant) Appellant,

AGAINST

CLARK-MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,
(Plaintiffs) Appellees.

Motion to Advance the Cause Under Rule 26.

Now comes Butte & Superior Copper Company, Limited, appellant in the above-entitled action, and moves the Court to advance the case for argument under Rule 26 of the rules of this Court.

The Matter Involved.

By this appeal a review is sought of a decision of the Ninth Circuit Court of Appeals affirming a decree of the United States District Court for the Dis-

trict of Montana awarding appellees priority of "mining rights", under a junior mining patent, to ores beneath the surface of appellant's mining claims (one of which is a prior patented claim), and to a vein (having, as the court found, split apices, one branch of which crosses both side lines of appellant's prior patented claim), to the point of its last departure from such junior patented claim; with reserved rights in the other branch and in the other veins, dependent upon future development; also a large money judgment for ore extracted by appellant beneath its own surface, with similar reserved rights of further recovery if warranted by later developments; and, finally, an accounting and perpetual injunction. Among other questions, the case presents the following:

> **(1) Whether the fact that the appellee owner was one of the grantors of appellant's predecessor estops the former from claiming the ores or vein in the claim so granted.**
>
> **(2) Whether, under Section 2324, R. S., failure to comply with a Territorial statute as to location notices (Montana Extra Session Laws of 1873, p. 83) made the original location of appellees' claim void or merely voidable.**
>
> **(3) Whether, under Section 2332, R. S., a "holding and working" of mining ground under an invalid location, segregates or creates extralateral or other mining rights either as of the date of such attempted location or any other date anterior to appellant's prior patent; or whether it merely operates to permit the one so holding to claim and receive a United States patent.**

(4) The extent, under Section 2332, R. S., of the extralateral right in that branch of the split-apex vein that crosses both side lines of appellant's prior patented claim.

(5) Whether, on such branch, the artificial limiting-plane should be drawn through the point of first or point of last departure thereof across the side line common to those two patented claims. The branch vein at such point of crossing is 111 feet wide, and the section between such planes carries large ore values.

(6) The time when, under Section 2332, R. S.—as between two mining claim patents having no surface conflict—the conclusive validation of an otherwise invalid location of each, which is accomplished by its patent, shall take effect with respect to the junior patented claim having the earlier attempted location, as against the other patented claim.

(7) Whether, under Section 2332, R. S., appellees' validation of location by later patent may circumvent the previous patent of appellant so as to take away rights already secured by the latter.

(8) Whether Sections 2292, 2293 and 2294 of the Montana Revised Codes of 1907 should be read as attempting to validate an earlier invalid location so as to give it extralateral mining rights against an intervening patent to another claim, as to ore bodies beneath the surface of the latter, where both the invalid location of the first claim and the patent of the other long antedated the passage of the State statute.

(9) Whether, if so read, the State statute would not violate the Fourteenth Amendment of the Federal Constitution.

(10) Whether, if so read, the State statute would not violate the provision of the Federal Constitution conferring on Congress the exclusive power to dispose of the public domain.

(11) Whether, if so read, the statute would not oppose Section 2332, R. S., as being an attempt to modify the effect of a Federal patent.

(12) The force of the decision of the State Supreme Court of Montana in *Hickey* v. *Anaconda Copper Mining Company*, 33 Mont. 46, as a rule of property.

Reasons for Application.

The reasons for this application to advance are:

(1) Vast sums of money have been and are being spent to disclose the underground conditions in and about the disputed ores. To prevent the loss of this evidence by caving, large sums must be spent to preserve the workings until there will be no longer any need therefor as evidence.

(2) As regular mining operations progress from day to day in appellant's mine, there are disclosed continuous changes in vein, ore and ground conditions. These changes, because affecting the controversies, are subject to inspection by the experts of appellees and the appellant, and must be kept in condition therefor. This requires the work of a large force of employees, whose labor could otherwise be utilized in increasing the ore production of the mine. The available labor supply is limited, and this Government has urged maximum production.

(3) Appellant's mine is one of the largest zinc producing mines in the United States, and the ore bodies in dispute, and their related ore bodies, are among the largest known of the developed zinc deposits. The annual output of zinc from this mine is 175,000,000 pounds. Every pound is needed for war purposes. It is an important producer of lead and silver.

(4) A speedy hearing would shorten the period of upkeep incident to this litigation and to the final decision of questions reserved by the decree; and so would avoid waste of labor and very heavy expense.

(5) By reason of an impounding agreement in effect in this case during the litigation, large amounts of money, representing the proceeds of ores mined, have been and are being tied up and withheld from industrial use, for which use they are very much needed.

(6) The case carries questions of interpretation of the mining laws of the United States which have never before been decided by this Court. On some of them the courts of last resort of different States are in opposition to each other, and on one the lower Federal courts are opposed to the State court of last resort in the same State. These questions, of vital importance to the mining industry, put capital invested therein to large hazard because of the uncertainty of valuable underground rights while they remain undecided.

(7) Their speedy determination would end much litigation of a very costly nature and would avoid much more litigation of the same sort that is and will be constantly arising.

Respectfully submitted,

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AGAINST

CLARK-MONTANA REALTY COMPANY, a Corporation, and ELM ORLU MINING COMPANY, a Corporation,

(Plaintiffs) Appellees.

PLEASE TAKE NOTICE that on Monday, November 18, 1918, the motion to advance this case for argument, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Dated New York, November 4, 1918.

Respectfully,

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To:

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